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IN THE

Supreme Court of the United S

OCTOBER TERM, 1971

Docket No. .....

Supreme Court, U.
FILED
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MICHAEL RO[illegible], JR.,

MICHAEL FHAGEN and MIRIAM WINTERS,

Petitioners,

—v.—

ALAN D. MILLER, M.D., individually and as Commissioner of Mental Hygiene of the State of New York, and ALEXANDER THOMAS, M.D., individually and as Director of the Psychiatric Division, Bellevue Hospital Center,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

The petitioners pray that a writ of certiorari issue to review the remittitur and judgment of the Court of Appeals of the State of New York entered in this proceeding on January 6, 1972 (Appendix p. 19).

Opinions Below

The opinion of the Supreme Court, New York County, is reported at 65 Misc.2d 163, 317 N.Y.S.2d 128, and appears in the Appendix hereto at p. 22. The Opinion of the Appellate Division, First Department, is reported at 36 A.D.2d 926, 321 N.Y.S.2d 61, and appears in the Appendix hereto at p. 38. The Opinion of the Court of Appeals is reported

at 29 N.Y.2d 348, 328 N.Y.S.2d 393, and appears in the Appendix hereto at p. 40.

Jurisdiction

The remittitur and judgment of the Court of Appeals was entered on January 6, 1972. On March 20, 1972, Mr. Justice Marshall granted an extension of time in which to file this petition to and including May 15, 1972. The jurisdiction of this Court rests upon 28 U.S.C. Section 1257(3).

Questions Presented

Whether persons alleged to be mentally disabled can be deemed, by their inaction, to have knowingly and intelligently waived their right to a lawyer and a judicial hearing to oppose involuntary hospitalization.

Whether persons who are not alleged to be physically dangerous to themselves or others may be summarily hospitalized against their will without notice or opportunity for a prior judicial hearing, or, if already hospitalized, may be confined for an additional period of time without notice or opportunity for a prior judicial hearing.

Whether persons may be hospitalized against their wills when the individuals recommending hospitalization have not considered or explored less drastic alternatives.

Statutes Involved

The statutes involved, sections 78 and 72 of the New York Mental Hygiene Law, appear in the Appendix hereto at pp. 48 and 49.

Statement of the Case

This action was initially filed as a Civil Rights Action in the United States District Court for the Southern District of New York.[1] On December 4, 1969, the Hon. Edward Weinfeld ruled that the complaint, which questioned the validity of sections 78 and 72, raised substantial constitutional questions, and ordered the convening of a three-judge federal court. *Fhagen* v. *Miller,* 306 F. Supp. 634 (SDNY 1969). On April 20, 1970, however, by an unreported decision, the three-judge court abstained on the ground that state court construction of the challenged statutes might avoid some or all of the constitutional issues.

On June 22, 1970, petitioners filed a state court action raising, as the New York Court of Appeals subsequently noted, "essentially the same constitutional objections to the Mental Hygiene Law" as had been raised in the federal action (Appendix p. 43).

On December 9, 1970, the State Supreme Court ruled that sections 78 and 72 were, as construed, constitutional (Appendix p. 22). On May 13, 1971, the Appellate Division, First Department, modified and affirmed the judgment of the Supreme Court (Appendix p. 38).

On January 6, 1972, the Court of Appeals affirmed the final order of the Appellate Division (Appendix p. 40).

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[1] For a related case, see *Winters* v. *Miller,* 446 F.2d 65 (2d Cir. 1971), *cert. den. sub nom. Miller* v. *Winters,* —— U.S. ——, 30 L. Ed.2d 369 (1971), which summarizes facts pertinent also to this proceeding. The majority in that case found, as Judge Moore remarked in dissent, "that the §§78 and 72 procedures are inadequate from a due process point of view to justify" the state's assumption of a *parens patriae* role (446 F.2d at 74).

On January 20, 1972, petitioners, uncertain of their remedy, made a motion to restore the case to the calendar of the three-judge federal court. On March 21, 1972, however, the three-judge federal court, after examining the entire state court record, ruled that petitioners had unreservedly raised and litigated each of the federal constitutional issues in the state courts, and thereupon dismissed the federal complaint, leaving petitioners "free to seek review by appropriate action in the Supreme Court."

Petitioner Winters is a 59 year old unmarried woman. According to her undisputed affidavit, in early April of 1968 she moved to the King Edward hotel and selected for permanent residence a room approved by her Welfare Department caseworker and by the hotel management. On May 2nd, when she attempted to pay rent for that month, she was told to move to a rear room which she considered to be too shabby, and which she and her caseworker had earlier rejected. Her room, she was now told, was for "transients," not for permanents. As the Supreme Court found, the hotel management then called the police, who forcibly removed her from her room and, pursuant to section 78(3), transported her to Bellevue Psychiatric Hospital where she was admitted pursuant to section 78(1) (Appendix p. 26). There is no evidence, or even claim, that petitioner Winters had threatened or attempted to inflict physical injury upon herself or others, or had in any way annoyed her neighbors in the King Edward hotel, or the public.

On May 7, 1968, while petitioner Winters was hospitalized and receiving treatment, two Bellevue physicians executed a certificate which alleged that she was mentally ill, and which changed the status of her confinement from sec-

tion 78 to section 72, thereby extending her involuntary hospitalization for an additional sixty days (Appendix p. 26). Petitioner Winters was not given notice of that proposed extension of hospitalization and had no opportunity, prior thereto, to oppose it. Ultimately, on July 18, 1968, she was administratively discharged, without ever appearing in court.

Petitioner Fhagen, as the Supreme Court found, "was twice committed to Bellevue Hospital pursuant to Section 78 of the Mental Hygiene Law, and his further confinement beyond thirty days was effected by invoking the 'two physician' procedure of Section 72 of the Mental Hygiene Law" (Appendix p. 25). According to petitioner Fhagen's uncontested allegation, "he was confined for almost seven weeks without ever being accorded a judicial hearing . . . [and] even after he had filed his written request for release he was detained for over three weeks without a hearing." *Fhagen* v. *Miller,* 306 F. Supp. at 636. He was then administratively discharged.

How the Federal Questions Were Raised

The state court complaint demanded a judgment declaring sections 78 and 72 to be unconstitutional under the Fourth, Fifth and Fourteenth Amendments to the United States Constitution on each of the grounds raised in this petition. On July 27, 1970, petitioners made a motion for summary judgment, asking the Supreme Court to grant summary judgment for the relief demanded in their complaint. Petitioners thereafter appealed from denial of that motion to the Appellate Division, First Department, and then to the Court of Appeals.

REASONS FOR GRANTING CERTIORARI

I.

The New York State Court of Appeals decided federal questions of substance not theretofore determined by this Court.

A. *The Constitutionality of the Presumption of Waiver.*

In New York, as in the majority of states, judicial hearings and the appointment of counsel for persons alleged to require involuntary hospitalization are not mandatory. In New York, a person can be hospitalized involuntarily for his entire life without ever appearing before a judge. He can be hospitalized for 30 days under section 78,[2] then for an additional 60 days under section 72. Thereafter, he can be detained only under court order, but the order can be issued, and almost always is, without a hearing.

The patient confined under section 72, for example, will never receive a court hearing unless he affirmatively demands a hearing, in writing (Appendix p. 51).[3] This

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[2] Since the filing of this case the 30 day period has, by regulation, been reduced to 15 days. 14 NYCRR 62.2.

[3] The hearing may also be demanded by a relative, friend, or the Mental Health Information Service, but that almost never happens. The MHIS is grossly understaffed, especially in upstate New York where most of its employees are social workers, not lawyers. Jacobi Hospital, for example, has only one MHIS employee to handle 3,431 involuntary admissions per year—15 per work day (Rosenzweig Affidavit), not counting the continuing work load of previously admitted patients. Other hospitals are even less adequately staffed with MHIS employees. Accordingly, many patients never see a MHIS employee for days or weeks after admission. Furthermore, the patient will not receive notice of his right to demand a court hearing until five days after his admission (Appendix p. 51), if then (Appendix p. 27).

means, in practice, that the theoretical right to a hearing and to a court appointed lawyer is a sham. A study financed by the National Institute of Mental Health showed that in Bellevue in 1966 only 531 of the 4,496 patients held involuntarily under section 72 actually requested judicial hearings. The 12% request rate for 1966 continued through 1967 and declined to 7% in 1969.[4] Failure to request a hearing has important consequences. In 1966, 33.4% of those patients who did request a judicial hearing were discharged, compared with a discharge rate of 6.9% for those who did not request a hearing.[5] Thus, each year, in New York alone (and similar procedures prevail in many states) hundreds and perhaps thousands of people are deprived of their liberty because the statutes under which they are hospitalized place upon them the burden of bringing their plight to the attention of a court. To make matters worse, once hospitalized, patients are immediately subject to shock-therapy and tranquilizing medication, both of which may render the patient incapable of exercising his theoretical right to a hearing. E.g., *Thorn* v. *Superior Court of San Diego,* 83 Cal. Rep. 600, 464 P.2d 56 (1970); MENTAL ILLNESS AND DUE PROCESS, the Association of the Bar of the City of New York (1962), pp. 26 and 138.[6]

B. *Summary Hospitalization of Non-Dangerous Persons.*

It would be difficult to imagine a more harmless person than petitioner Winters. Except for minor verbal alter-

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[4] Kumasaka (M.D.), Stokes (M.A.) and Gupta (L.L.M.), "Criteria of Involuntary Hospitalization," unpublished study (Public Health Service Grant MH 16485), p. 3.

[5] *Id.*

[6] Petitioners Fhagen and Winters both alleged, without contradiction, that they were forced daily to take tranquilizing medications. And see, *Winters* v. *Miller, supra* note 1.

cations with a few of the residents in a previous hotel (see *Winters* v. *Miller, supra,* note 1), she had lived quietly, keeping to herself, without incident, for 59 years. Even if she had been mentally ill, which she vigorously disputes,[7] there was certainly no emergency which required that she be deprived of her liberty without notice or a prior opportunity to defend. Had she been given that opportunity, it is inconceivable that she would have been hospitalized. But she, and thousands like her, have been permanently and unnecessarily stigmatized with the label "mental patient." No societal interest required that she so summarily be stigmatized.

Involuntary hospitalization, even if promptly rectified, has continuing adverse consequences.[8] Thus, unless very substantial state interests are involved, the state should not subject citizens to involuntary hospitalization without prior notice and an opportunity to defend. At common law, the only state interest which justified summary hospitalization was the probability, absent hospitalization, of imminent physical injury to the patient or others. *Warner* v. *State,* 297 N.Y. 395, 401 (1948). To permit summary hospitalization for less compelling reasons invites precisely the type of abuse present in this case.

The New York Court of Appeals ruled that summary hospitalization of non-dangerous persons was constitutional (Appendix p. 40). It believed that "the preserva-

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[7] Her hospital records acknowledged that her "judgment" was "normal," and that her "recent memory, retention and recall, counting and calculations, school and general knowledge, and abstraction ability" were all "good."

[8] Petitioner Fhagen, for example, has been denied several jobs because he is a former patient.

tion of public order and public health" justified "immediate action" (Appendix p. 45). As examples of what it meant by public order and public health, the Court of Appeals mentioned "disorderly conduct, criminal nuisance, public lewdness, or sexual abuse of a minor" (Appendix p. 45). Even if those four state interests are of sufficient magnitude to justify summary hospitalization, which petitioners dispute, they are irrelevant to the facts of this case. No one even claimed that petitioners Winters and Fhagen had engaged in disorderly conduct, criminal nuisance, public lewdness, or sexual abuse of a minor. They, and thousands like them, were hospitalized without notice or hearing because of a concept no more precise than "public order and public health."

The state's interest in the summary hospitalization of the non-dangerous mentally ill is indeed negligible. But the state's interest in summarily extending the period of hospitalization of a person already hospitalized and receiving treatment, is even less apparent. There is in the record uncontradicted evidence that in 1968, for example, two-thirds of all section 72 "admissions" to New York State mental hospitals were, in fact, retentions of patients who had already been hospitalized under some other section, usually section 78, when the certificate required by section 72 was executed. Once a person is hospitalized, by whatever means, there is no conceivable state interest sufficient to justify extending his period of hospitalization without prior notice and opportunity for a hearing.

C. *Less Drastic Alternatives.*

Even if a person is mentally ill, it is usually not necessary that he be subjected to full-time hospitalization. Sev-

eral studies have shown, using random samples of persons who would otherwise have been hospitalized, but who were in fact treated in day hospitals or in the community, on an out-patient basis, that the out-patient groups did significantly better than control groups of in-patients, and cost the state only half as much money.[9] Sections 78 and 72, however, do not require the consideration or exploration of less drastic alternatives.

Petitioner Fhagen was released from Bellevue to receive out-patient treatment. But as the Supreme Court found, it was he, not the staff at Bellevue, who came up with that viable alternative (Appendix p. 36). An uncontradicted affidavit in the record states that the Bellevue psychiatrist who was on his way to testify that petitioner Fhagen required long-term hospitalization did not even know, until advised by Fhagen's attorney, that Fhagen had left Bellevue on a pass and had been examined by two psychiatrists who, after examination, expressed willingness to treat him on an out-patient basis.

Most patients, including petitioner Winters, are not as familiar with community alternatives as was petitioner Fhagen. Unless the hospital explores those alternatives, those patients will continue to be unnecessarily confined. The Supreme Court, however, ruled that although exploration of less drastic alternatives was "meritorious," it was not constitutionally required (Appendix p. 36).

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[9] Wilder, Levin & Zwerling, "A Two-Year Follow-up Evaluation of Acute Psychotic Patients Treated in a Day Hospital," 122 American Journal of Psychiatry 1095 (1966); Langsley, "Family Crisis Therapy," 7 Family Process 145 (1968).

II.

The ruling below is not in accord with applicable decisions of this Court.

A. *The Presumption of Waiver.*

The ruling below is inconsistent with the general principles governing waiver of counsel or a hearing announced in *Johnson* v. *Zerbst,* 304 U.S. 458, 464 (1938), *Boykin* v. *Alabama,* 395 U.S. 238 (1969), *Carnley* v. *Cochran,* 369 U.S. 508 (1962), *Swenson* v. *Bosler,* 386 U.S. 258 (1967), *Glasser* v. *United States,* 315 U.S. 60 (1941), *Von Moltke* v. *Gillies,* 332 U.S. 707 (1947), and *Aetna Insurance Co.* v. *Kennedy,* 301 U.S. 389, 393 (1937).

It is particularly inconsistent with the principles governing persons who are alleged to be, or who may be, under mental disability announced in *Pate* v. *Robinson,* 383 U.S. 375 (1966), and *Covey* v. *Town of Somers,* 351 U.S. 141 (1956).[10]

In *Pate* v. *Robinson,* seven members of this Court ruled that a defendant's failure to demand a sanity hearing concerning his competence to stand trial did not constitute a waiver of the right to such a hearing because "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial" (383 U.S. at 384). Mr. Justice Harlan, joined by Mr. Justice Black, dissented on other grounds but agreed that "waiver is not an apposite concept where we premise a defendant so deranged that he cannot oversee his lawyers" (383 U.S. at

[10] See also, *In Re Gault,* 387 U.S. 1 (1967).

388). Thus, even though Robinson had a court-appointed lawyer, and even though his lawyer could expressly have demanded a sanity hearing, but did not, this Court unanimously found there was no waiver. Certainly the same rule should apply to these petitioners, who had not been assigned lawyers.

In *Covey* v. *Town of Somers,* this Court ruled that notice to a person who was at the time legally competent but who was known to be under mental disability (and who was shortly thereafter hospitalized) of that person's right to appear and oppose a judicial foreclosure proceeding was not constitutionally sufficient, and that her failure to appear and defend did not, therefore, preclude suit by a subsequently appointed committee to reopen the foreclosure. Because incompetent persons are often incapable of exercising their theoretical right to a hearing, this Court ruled that "notice to a person known to be an incompetent who is without the protection of a guardian does not measure up to" the requirements of due process (351 U.S. at 146).[11] *Covey* thus compels a finding that the statutes here under consideration are unconstitutional.[12]

To rule in petitioners' favor would not mandate judicial hearings in every case. It would, however, require that all involuntary patients be given judicial hearings, either before or promptly after hospitalization, unless they affirma-

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[11] To the same effect, see *Dale* v. *Hahn,* 440 F.2d 633, 638-639 (2d Cir. 1971).

[12] The lower federal courts have criticized statutes which allowed mental patients to demand judicial hearings but which, absent request, did not mandate a hearing at any time. E.g., *Anderson* v. *Solomon,* 315 F. Supp. 1192, 1194 (D.Md. 1970) (three-judge court); *Heryford* v. *Parker,* 396 F.2d 393 (10th Cir. 1968). And see, *Fuller* v. *Mullinax,* 364 Mo. 858, 269 S.W.2d 72 (1954).

tively waived their right to a hearing *after* consultation with assigned counsel.

B. *Summary Hospitalization or Retention of the Non-Dangerous Mentally Ill.*

As this Court noted less than two months ago, "compulsory psychiatric treatment," even when ordered by a court after a full-scale hearing, is usually based "not solely on the medical judgment that the defendant is mentally ill and treatable, but also on the social and legal judgment that his potential for doing harm, to himself or to others, is great enough to justify such a massive curtailment of liberty." *Humphrey* v. *Cady,* —— U.S. ——, 31 L. Ed.2d 394, 402 (1972).

The decision below, however, authorizes such massive curtailments of liberty *without* court hearings for persons who are entirely harmless.

Although section 78 purports to be the "emergency" hospitalization section, respondents' affidavits acknowledged that nearly 100% of the admissions to Bellevue and other New York City mental hospitals are under section 78.

Section 78 permits a person to be apprehended in the community and transported to a mental hospital based upon nothing more substantial than the allegation of a layman (in petitioner Winters' case, a hotel clerk) that said person is "in need of immediate observation, care or treatment for mental illness." Section 72 authorizes summary hospitalization upon the certificate of two physicians, who do not have to be psychiatrists, that the prospective patient is "mentally ill and suitable for care and treatment." A "mentally ill" person is defined in section 2(8) of the

New York Mental Hygiene Law as "any person afflicted with mental disease to such an extent that for his own welfare or the welfare of others, or of the community, he requires care and treatment."

Thus, under New York's Mental Hygiene Law, as construed by the Court of Appeals, the so-called "emergency" (section 78) and "medical" (section 72) commitment provisions are broad enough to effect the summary hospitalization of every person alleged to be mentally ill, whether dangerous or not. There is, in New York, no class of allegedly mentally ill persons for whom the ordinary due process safeguards of prior notice and hearing are guaranteed.

In *Specht* v. *Patterson,* 386 U.S. 605, 608 (1967), this Court ruled unequivocally that "commitment proceedings whether denominated civil or criminal are subject . . . to the Due Process Clause." See also, *In Re Gault,* 387 U.S. 1 (1967).

Due process may mean different things in different contexts, but the core concept is clear: " . . . the right to be heard *before* being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society. . . . No better instrument has been designed for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123, 168, 171-172 (1951) (Frankfurter, J., concurring; emphasis added).

Of course, "in extraordinary situations," the notice and hearing may follow, rather than precede, the loss. *Sniadach*

v. *Family Finance Corp.*, 395 U.S. 337, 339 (1969). In *Sniadach,* however, seven members of this Court ruled, with Mr. Justice Harlan concurring, that a temporary freeze in the "use" of wages did not meet due process requirements, even though the wage earner had the right, subsequent thereto, to contest the garnishment. The amount of garnished wages was $31.59. Mr. Justice Harlan, noting that "this deprivation cannot be characterized as de minimis," ruled that the wage earner "must be accorded the usual requirements of procedural due process: notice and a prior hearing" (395 U.S. at 342).

Petitioner Fhagen was employed as a house painter at the time of his commitment. During the seven weeks he was hospitalized he lost much more than the $31.59 whose temporary seizure was characterized as more than de minimis in *Sniadach.* And, in addition, he lost his liberty.

Similarly, in *Goldberg* v. *Kelly,* 397 U.S. 254 (1970), this Court, citing *Sniadach* and *McGrath,* ruled that welfare benefits could not be terminated without a prior evidentiary hearing, even though the recipient had the right at a subsequent hearing to contest the termination and to recoup benefits erroneously withheld.

The interests asserted by the state in *Goldberg* (conserving fiscal and administrative resources), are far more substantial than the state's negligible "public order and public health" interest in summary hospitalization of the nondangerous mentally ill. Thus, unless property is more important than liberty, the prior decisions of this Court compel reversal of the decision below.[18]

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[18] Due process requires opportunity for a hearing "at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo,* 380

In any event, once a person is already hospitalized and receiving treatment, there is no conceivable state interest that would justify extending his period of hospitalization without giving him notice and a prior opportunity for a hearing to contest the necessity for the proposed extension.

C. *Less Drastic Alternatives.*

This Court has never ruled that involuntary hospitalization is constitutionally permissible only if there are no less drastic alternatives. But the doctrine of less drastic alternatives is certainly applicable, in principle, to civil commitment proceedings. In the case of *In Re Gault,* 387 U.S. 1 (1967), for example, this Court criticized a juvenile court for failing "to explore alternatives to involuntary commitment in a civil proceeding," citing *Lake* v. *Cameron,* 124 U.S. App. D.C. 264, 364 F.2d 657 (1966), "which arose under statutes relating to treatment of the mentally ill" (387 U.S. at 28, note 41, and accompanying text).[14]

Firmly rooted in American jurisprudence is the principle that "even though the governmental purpose be legitimate," no person can be "deprived of fundamental personal liberties" if there are "less drastic means for achieving the same basic purpose." *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960).

U.S. 545, 552 (1965). Post-hospitalization hearings are inadequate because, even if successful, as they often would be (see note 5 *supra,* and accompanying text), they cannot restore the days or weeks of lost liberty which the patient suffered.

[14] See also, *Chy Lung* v. *Freeman,* 92 U.S. 275 (1875) which, though it did not involve the commitment of the mentally ill, did involve a statute which authorized the exclusion from California of lunatics, idiots, and others. The statute was held unconstitutional because it was not "limited to provisions necessary and appropriate" to achieve its purpose (92 U.S. at 280).

Application of that principle is not, as respondents have contended, limited to free speech cases. E.g., *Griswold* v. *Connecticut,* 381 U.S. 479, 485 (1965); *Aptheker* v. *Secretary of State,* 378 U.S. 500, 507-508 (1965); and *Shapiro* v. *Thompson,* 394 U.S. 618 (1969).

In *Covington* v. *Harris,* 419 F.2d 617 (D.C. Cir. 1969), and in *Wyatt* v. *Stickney,* —— F. Supp. —— (M.D. Ala., April 13, 1972, Civil Action No. 3195-N), two lower federal courts held that exploration of less drastic alternatives was a constitutional requirement in cases involving involuntary hospitalization of the mentally ill. Any other rule would be inconsistent with this Court's prior decisions, and would condemn hundreds of thousands of people to unnecessary hospitalization.[15]

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[15] There are nearly three times as many mental patients as there are prisoners. On any given day, nearly three-quarters of a million persons reside in this nation's mental hospitals—400,000 in state and county mental hospitals, and the remainder in V.A. hospitals, private hospitals, and general hospitals with psychiatric wards, such as Bellevue. At current hospitalization rates, one of every ten Americans will at some point be hospitalized for mental illness. Roughly half those persons are over the age of sixty and need nursing homes and geriatric facilities rather than psychiatric facilities. The vast majority of the remainder could more adequately be treated in community facilities on an out-patient basis. But unless the state is required to explore alternatives, they will continue to be hospitalized unnecessarily.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

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